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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDY BERREONDO,

Defendant and Appellant.

In re EDY BERREONDO,

on Habeas Corpus.

B158604

(Los Angeles County
Super. Ct. No. LA036708)

B161876

APPEAL from a judgment of the Superior Court of Los Angeles County and PETITION for writ of habeas corpus, Frank J. Johnson, Judge. Judgment reversed in part and remanded, otherwise affirmed; petition denied.

Shawn O’Laughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General and J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

In this combined petition for writ of habeas corpus and appeal, Edy Berreondo challenges his conviction for conspiracy to commit carjacking, carjacking, attempted first-degree robbery, and assault with a deadly weapon. We reject Berreondo's principal argument that he received ineffective assistance of counsel. We also reject his claim that he did not have notice of the charge of assault with a deadly weapon and find that conviction to be supported by substantial evidence.

With respect to three of the convictions, the jury found a gang enhancement under Penal Code section 186.22 to be true. We find that the gang enhancements are not supported by substantial evidence and reverse those findings. We also find that the case must be remanded to the trial court for resentencing. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

On October 4, 2000, Roger Smith worked as a taxi driver and was called to an apartment at 5021 Klump Avenue where Edwin Gonzales, a former North Hollywood Boyz gang member, resided. Smith drove to the apartment, and three people, including Berreondo, entered the taxi. The three passengers were all members of the North Hollywood Boyz gang.

One passenger told Smith where to stop -- at the corner of Oxnard and Shady Glade. When they arrived at the designated location, Smith rolled down his window to collect the fare. Berreondo then opened Smith's door and held a large handgun to Smith's temple. Smith identified Berreondo as the individual who held the gun to his head and testified that he looked at Berreondo's face. Berreondo stood about three or four inches from Smith and ordered Smith to get out of the car. Berreondo threatened Smith and Smith grabbed the gun and moved it away from his head. Another passenger punched and kicked Smith.

Smith struggled with Berreondo for approximately a minute or a minute and a half, but was not able to gain control of the gun. One of the other passengers searched Smith's pockets for money.

Smith freed himself and ran away. Smith heard three or four gunshots.

William Mancini resided on Shady Glade, near where Smith had stopped his taxi. On October 4, 2000, as he was watching television, Mancini heard gunshots and went outside. Mancini saw two men fighting but could not identify them. Then someone knocked off his glasses and, shortly afterwards, Mancini felt a sharp pain in his knee. Mancini had been shot.

Berreondo and the two other passengers drove away in Smith's taxi.

Identification of Berreondo

As summarized above Smith identified Berreondo at trial. Prior to trial, Smith had not been able to make a positive identification based on photographs even though Smith had been shown Berreondo's photograph.

Edwin Gonzales, a former member of the North Hollywood Boyz gang, testified that he knew Berreondo and Berreondo attended a party at his apartment on October 4, 2000. Gonzales saw Berreondo leaning against a taxi, and testified, at the preliminary hearing, that Berreondo entered the taxi.

Gonzales's trial testimony differed from his preliminary hearing testimony. At trial, Gonzales testified that Berreondo was near the back bumper of the taxi and that he never saw Berreondo enter the taxi. Gonzales acknowledged that he did not want to testify and that "it's not right to testify against a gang member."

Officer Melissa Popovic, a forensic print specialist, testified that she lifted fingerprints from beer cans inside Gonzales's apartment. The parties stipulated that Officer Efren Cafaras would have testified that three of the beer cans contained Berreondo's prints. Detective Andres Alegria testified that when he asked Berreondo if he had been to the Gonzales's apartment, Berreondo responded that he had never been there. Berreondo informed Alegria that he was with his girlfriend.

Gang Evidence

Officer Gary Pugliese, a Los Angeles city police officer, testified that Berreondo is a member of the North Hollywood Boyz gang and has gang tattoos. Pugliese's duties as

an officer include the following: “to gain intelligence on our particular gang . . . make contact with our local gang members in the area, use this intelligence to conduct investigations and to make arrests of gang members.” Pugliese attended seminars and shared information with other gang experts.

Pugliese opined that each of the crimes were committed for the benefit of a street gang. Pugliese explained : “My opinion is that at 5021 Clump [*sic*], that is a residence of a North Hollywood – admitted North Hollywood gang member, that’s his residence, that’s where it started, where the group of gang members from North Hollywood Boyz were together drinking and so forth.” Pugliese continued: “They had a taxicab come to the location. There are – three of the members of the gang entered the taxicab. After they left that area, the taxicab was basically carjacked. When a struggle ensued, they attempted to shoot the taxi driver, ended up shooting another person who attempted to assist the taxi driver. Then after basically securing or obtaining the taxi and getting away from the taxi driver, they went to another location where they committed another robbery. You have three members from the same gang, all admitted gang members from that gang, North Hollywood Boyz, acting in concert, doing multiple robberies and violent crimes against citizens.” Pugliese also explained that “the robberies were done to obtain money, done by multiple gang members from the same gangs together and basically it would be considered putting in work for the gang.” Pugliese defined “putting in work for the gang” as “going out and doing drivebys, shootings or any other crime combination – a rival gang going out and committing robberies with fellow gang members, against citizens, anything like that, where the – where they are representing or doing it with fellow gang members; or even by themselves by representing the gang is considered putting in work.”

Pugliese further testified that North Hollywood Boyz gang members typically commit attempted murder, carjacking, robbery, assault with a deadly weapon, vandalism, and rape. Pugliese testified that, in his opinion, the crimes were committed for the

purpose of obtaining money, and the crimes “would be considered putting in work for that gang.”

Berreondo’s Alibi Defense

Noemy Acevedo, Berreondo’s girlfriend’s sister, testified that she picked up Berreondo at Gonzales’s apartment between 9:00 and 9:30 p.m. on October 4, 2000. Acevedo explained: “Edy had called and had told me that he was in trouble for something; that I guess he said he was with – one night, he had had called – he had called me, which me and my sister were at home, and said that if we can pick him up from his friend’s house.” According to Acevedo, she and Berreondo went home after Acevedo picked up Berreondo.

No other witness testified for the defense. Defense counsel argued Berreondo’s fingerprints were not found in the taxi, and argued that this constituted circumstantial evidence that he was not in the taxi. Counsel argued that Smith’s courtroom identification was wrong because he was unable to identify Berreondo from photographs. Counsel argued that there was no evidence who fired the gun at Mancini because Mancini did not have his glasses or who fired the gun at Smith because Smith was running away and had his back to the person who fired.

PROCEDURAL BACKGROUND

The first amended information¹ contains eight counts, four of which were dismissed by the trial court. The remaining counts include conspiracy to carjack, carjacking, first-degree robbery, and mayhem. The first three involved Smith and the last involved Mancini. Each count was alleged to have been committed for the benefit of a criminal street gang (Pen. Code² § 186.22(b)(1)). Prior convictions under sections 667(a)(1), 667.5(b), and 1170.12(a)-(d) were alleged with respect to each count. The

¹ We refer to the first amended information as the information.

² All further statutory citations are to this code.

carjacking count also included a personal use enhancement under section 12022(a)(1). The attempted first-degree robbery included personal use enhancements under section 12022(a)(1) and section 12022.53, subdivisions (c) and (e).

Berreondo pled not guilty and was tried before a jury. He was represented by Frank DiSabatino.

Berreondo was convicted of conspiracy to commit carjacking (Count One) and the gang allegation was found true. Berreondo was convicted of carjacking (Count Three) and the gang allegation was found true. With respect to Count Three, the jury also found that Berreondo was a principal armed with a firearm within the meaning of section 12022, subdivision (a)(1), 12022.5, subdivision (a)(1) and (e)(1) (an enhancement not included in the information). The jury found Berreondo guilty of attempted first-degree robbery and found enhancements under section 12022.5, subdivision(a)(1) and (e)(1) to be true (neither of which were included in the information). The verdict form did not include a gang allegation for the attempted first-degree robbery. The jury found Berreondo guilty of assault with a deadly weapon (a count not included in the information) and found the gang allegation on that count to be true (an enhancement not included in the information). The jury verdict does not specify the victim of the assault with a deadly weapon.

After trial, Berreondo substituted new counsel, Walter Urban. Berreondo admitted he suffered a previous felony conviction. Berreondo argued that his trial counsel rendered ineffective assistance, and the trial court denied the motion.

The trial court sentenced Berreondo to a total term of 40 years and eight months. The court treated the carjacking as the base term, sentenced Berreondo to the midterm of five years, and doubled the sentence pursuant to section 1170.12 for a total of ten years. The court imposed an additional two years for the gang enhancement under section 186.22, subdivision (b)(1). The court imposed an additional 20 years for the firearm allegations under section 12022.53, subdivisions (c) and (e). (The jury was not asked to and did not find allegations under section 12022.53 to be true.) The court stayed the

firearm allegations under section 12022, subdivision (a)(1) and section 12022.5, subdivision (a)(1). (There were no allegations under section 12022.5, subdivision (a)(1) in the information.) The court imposed and stayed a 27-year sentence on the attempted first-degree robbery count. The sentence included the high term of four years for the attempted robbery, three years for the gang allegation (which the jury did not find to be true), and 20 years for the firearm enhancement under section 120022.53 (which the jury did not find to be true). The court stayed all other firearm use enhancements. With respect to the assault with great bodily injury (which was not included in the information), the court sentenced Berreondo to one third the midterm – one year and doubled it under section 1170.12 and to an additional eight months based on the gang allegation (which also was not included in the information). The court sentenced Berreondo to five years for the prior under section 667, subdivision (a) and to one year under section 667.5, subdivision (b).

Berreondo petitioned this court for a writ of habeas corpus and appealed the judgment.

DISCUSSION

In part I, we consider Berreondo's conviction for assault with a deadly weapon. In part II, we consider whether there is sufficient evidence to support the jury's true findings of the gang enhancements. In part III, we explain why this case must be remanded to the trial court for resentencing. Finally, in part IV, we discuss Berreondo's argument that he received ineffective assistance of counsel.

I. Assault With A Deadly Weapon

Although Berreondo has demonstrated that the record lacks clarity, he has not shown that his conviction of assault with a deadly weapon must be reversed either because the notice was insufficient or because the record lacks substantial evidence.³

³ We requested supplemental briefing on each of these issues.

A. Due Process

The jury convicted Berreondo of assault with a deadly weapon, a lesser included offense of assault with a semiautomatic. The information contains no count of assault with a semiautomatic or assault with a deadly weapon. However, the jury was instructed on both assault with a semiautomatic and assault with a deadly weapon. In addition, both the prosecutor and defense counsel expressly referred to this count in their closing arguments. The prosecutor argued “You have before you the assault against William Mancini, the man shot in the leg. . . .” Defense counsel argued the prosecution had the burden of proof, to show among other things “assault with a deadly weapon on Mr. Mancini.”

“No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.” (*Cole v. Arkansas* (1948) 333 U.S. 196, 201.) However, this right may be either expressly or impliedly waived. (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on other grounds in *People v. Guinan* (1998) 18 Cal.4th 558, 568, fn. 3.) An implied waiver occurs where no defense objection is made to instructions given by the court. (*Id.* at p. 977.) Here, Berreondo implicitly waived the right to notice in the accusatory pleading when he did not object to instructions on the charge of assault with a semiautomatic or assault with a deadly weapon and when he expressly argued this charge to the jury.

B. Substantial Evidence

The issue of substantial evidence is close; the evidence at most shows that Berreondo and other members of the North Hollywood Boyz gang were present when Mancini was shot and that Berreondo was armed. At the time of the shooting, Smith was running away from the scene and Mancini could not see because someone had knocked his glasses off his face.

Applying the appropriate deferential standard of review, we conclude a reasonable trier of fact could have found that Berreondo shot Mancini, i.e. assaulted Mancini with a deadly weapon. “In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

There was evidence that Berreondo was at the scene and was armed with a firearm. No evidence was presented that anyone else at the scene was armed with a firearm. The jury also could have inferred consciousness of guilt based on the evidence that Berreondo stated he was not at Gonzales’s apartment even though his fingerprints were found on beer cans there. Berreondo’s statement also conflicted with Acevedo and Gonzales’s testimony. Acevedo testified that she picked him up at Gonzales’s apartment, and Gonzales testified Berreondo attended a party at his apartment. Where “two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions” for those of the trier of fact. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Berreondo’s conviction for assault with a deadly weapon is supported by substantial evidence.⁴

⁴ The jury was instructed that “[t]he burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged. [¶] If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty.” Defense counsel argued that there was no evidence Berreondo shot Mancini, and the jury must have rejected that argument.

II. Gang Enhancements

Section 186.22, subdivision (b)(1) imposes additional punishment where a person “is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . .” We apply the substantial evidence test to determine whether there is sufficient evidence to support the jury findings. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

The record lacks sufficient evidence to support the jury’s finding on the three gang enhancements under section 186.22, subdivision (b)(1). There was evidence that Berreondo was a member of the North Hollywood Boyz gang and entered a taxi with other members of the same gang. However, there was no evidence that Berreondo “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . .”

First, no evidence was introduced regarding Berreondo’s intent in committing the crimes. Second, although Officer Pugliese testified that the crimes were committed for the benefit of the gang, his explanation provided no basis for his opinion that the conspiracy to commit carjacking, carjacking, or assault with a deadly weapon were committed for the benefit of the gang. Most of the officer’s testimony was a summary of the allegations in the information (some of which were dismissed by the trial court). Pugliese’s opinion that the crimes were committed to benefit the gang appears to be based on the fact that multiple gang members were present and that the gang members met at a party prior to leaving in Smith’s taxi. That evidence is not sufficient to support the enhancement under section 186.22. The presence of gang members in multiple numbers does not, standing alone, support the inference that the crimes were for the purpose of a gang. By Pugliese’s own definition “doing work for the gang” requires “representing” the gang, and here there is no evidence of such “representation.” Other

than the perpetrators' membership in the North Hollywood Boyz gang, there is no indicia that the crimes were gang related.

III. Berreondo's Sentence

Berreondo correctly points out that the sentence imposed by the trial court does not conform to the information or verdict. Resentencing is required. In resentencing Berreondo, the trial court should comply with the following three guidelines. First, Berreondo may be sentenced only under those enhancements to which he had notice (*People v. Hernandez* (1988) 46 Cal.3d 194, 208, disapproved on other grounds in *People v. King* (1993) 5 Cal.4th 59, 78, fn. 5) or expressly or impliedly waived notice. (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.) Second, Berreondo may be sentenced under only those enhancements the jury or the court found to be true. (*People v. Mitchell* (2000) 81 Cal.App.4th 132, 155[“California statutorily provides the defendant the ‘hallmarks of a trial on guilt or innocence’ on the truth of prior conviction allegations, including the mandate that a true or not true finding be made”], fn. omitted.) Third, Berreondo cannot be sentenced cumulatively to enhancements under both sections 667 and 667.5. (*People v. Jones* (1993) 5 Cal.4th 1142, 1153.)

IV. Alleged Ineffective Assistance of Counsel

Berreondo argues that the public defender representing him and his private counsel both rendered ineffective assistance. A defendant asserting a claim of ineffective assistance of counsel must demonstrate: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that defendant suffered prejudice from the deficiency. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) “Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” (*Strickland v. Washington* (1984) 466 U.S. 668, 689.)

We consider Berreondo's claims of ineffective assistance separately. As we shall explain, Berreondo's showing falls far short of that required to demonstrate he received constitutionally deficient representation.

A. Ms. Galvin

Berreondo first argues that Urban rendered ineffective assistance by failing to obtain DiSabatino's declaration as to why DiSabatino did not call an additional alibi witness, Adriana Galvin, Berreondo's girlfriend. With respect to the underlying failure to call Galvin, Berreondo argues that no reasonably competent attorney would refuse to present an alibi witness and that it is clear two alibi witnesses are better than one.

Contrary to Berreondo's assertion, two alibi witnesses are not always better than one. "[A]n attorney may have legitimate reasons for deciding not to parade a large number of witnesses to the stand to corroborate an alibi: for example, if after reasonable investigation he finds they are untrustworthy, unsavory, or unconvincing, he may make the informed decision to keep them from the jury." (*In re Hall* (1981) 30 Cal.3d 408, 427.) Here DiSabatino investigated the alibi theory and was aware of Ms. Galvin's potential testimony but determined Ms. Acevedo was more credible, a conclusion Berreondo does not challenge. DiSabatino explained his reasons as follows: "After speaking to both Galvin and Acevedo, I believed that Acevedo would be a more credible witness." Although the failure to investigate a potential witness may warrant reversal (*In re Hall, supra*, 30 Cal.3d 408, 427-428; *People v. Shaw* (1984) 35 Cal.3d 535, 540-542; *People v. Bess* (1984) 153 Cal.App.3d 1053, 1059-1061), counsel cannot be faulted for deciding not to call a witness whose testimony might do more harm than good. (*People v. Miranda* (1987) 44 Cal.3d 57, 121, disapproved on another point in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) Berreondo has not shown that the failure to call Ms. Galvin was anything other than "sound trial strategy." (*Strickland v. Washington, supra*, 466 U.S. at p. 689.)

B. Pablo Lopez

Berreondo argues that DiSabatino rendered ineffective assistance in failing to call Pablo Lopez and his coworkers as alibi witnesses. Berreondo does not provide any evidence of what Lopez or his unnamed coworkers would have stated if they had testified. To prevail on a claim of ineffective assistance of counsel, Berreondo bears the burden of establishing the nature and relevance of the evidence that was not presented or discovered. (*In re Sixto* (1989) 48 Cal.3d 1247, 1256.) Berreondo fails to satisfy any of these requirements.

C. Identification Expert

Berreondo argues that identification was a critical element in this case and his counsel rendered ineffective assistance in failing to call an expert on “misidentification.” Berreondo argues that the jury should have been educated on the effects of stress, lack of illumination, multiple targets, weapon focus, cross-racial identification, and photo biasing.

Assuming error for the sake of argument, Berreondo cannot show prejudice. First, as Berreondo acknowledges, the trial court found that “eye witness expert testimony would have been ‘useless’ because Gonzales knew Berreondo and identified Berreondo at the preliminary hearing” Berreondo does not provide any explanation how an expert on identification would have undermined testimony by a witness who had known Berreondo for a period of time prior to testifying.

Second, Berreondo fails to recognize that the jury was expressly instructed on the factors he argues the jury should have considered. In accordance with CALJIC No. 2.92, the jury was instructed to consider in proving identity by eyewitness testimony including the opportunity of the witness to observe the act, stress, if any, cross-racial identification, the witness’s capacity to make an identification, in addition to the witness’s ability to identify the perpetrator in a photographic lineup, and whether the witness’s identification was a product of his own recollection. Thus, the jury was apprised of the very factors, Berreondo argues the jury should have been told.

Third, counsel specifically argued to the jury that Smith's identification was suspect because Smith was unable to identify Berreondo based on photographs. Counsel's argument reminded the jury of the need to carefully consider Smith's in court identification. Because the record indicates the jury was aware of the factors necessary to consider in evaluating Smith's identification and because Gonzales also identified Berreondo, albeit at the preliminary hearing, Berreondo fails to show that it is reasonably probable he would have obtained a more favorable result if an expert on eyewitness identification had testified.

D. Gang Expert

Officer Pugliese testified for the prosecution and opined that Berreondo's crimes were committed for the benefit of a street gang. Berreondo argues his counsel rendered ineffective assistance for failing to call a gang expert. Because we find that the jury's findings on the enhancement allegations must be reversed, we do not further consider this alleged ineffective assistance of counsel.

E. Verdict Forms

Berreondo argues Urban rendered ineffective assistance of counsel because he knew the verdict forms were "infirm" but did not litigate the issue. Berreondo also points out that Urban did not pursue a motion drafted by DiSabatino indicating that two jurors believed the assault with a firearm count applied to Smith, not Mancini.

Berreondo does not show it is reasonably probable he would have obtained a more favorable result if Urban had objected to the verdict forms or advanced an argument based on jury misunderstanding. Indeed, Berreondo's only claim of prejudice is that "[t]he ineffective assistance rendered by Urban serves to undermine confidence in the outcome of the proceedings below." Berreondo's bare assertion is insufficient to show prejudice.

F. Urban's Ineffective Assistance of Counsel Motion

Berreondo argues that Urban was ineffective in his presentation of his motion that DiSabatino rendered ineffective assistance of counsel. Berreondo argues "Mr. Urban

never alerted the court to the existence of the additional alibi witness Lopez, or the possibility that the co-workers of Lopez may also have seen Berreondo” Berreondo fails to establish that DiSabatino rendered ineffective assistance of counsel and therefore his derivative claim that Urban rendered ineffective assistance in failing to point out DiSabatino’s ineffective assistance also fails. In other words, Berreondo cannot show prejudice unless he is able to show, at a minimum, that it is reasonably probable Mr. Urban would have prevailed if he had presented a better developed motion.⁵

DISPOSITION

The jury’s true findings on the Penal Code section 186.22, subdivision (b)(1) allegations are reversed. The case is remanded to the trial court for resentencing consistent with this opinion. In all other respects the judgment is affirmed. Following

⁵ Berreondo argues that Urban rendered ineffective assistance of counsel in failing to adequately prepare a sentencing memorandum and in failing to object to the sentence imposed. Because we conclude that resentencing is necessary, we need not consider this issue.

Berreondo also maintains that cumulative error of ineffective assistance before trial, during trial, and after trial requires reversal. We do not discuss this contention because we find no ineffective assistance of counsel.

resentencing, the trial court must enter a new abstract of judgment. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.